

**Central Washington Home Builders Association
Comments On
Draft Phase II MS4 Permit and Fact Sheet For Eastern Washington
Formal Public Comment Drafts**

1. Permit S2.C, page 5, beginning at line 33, reads: "This permit authorizes discharges from emergency fire fighting activities, unless the discharges from fire activities are identified as significant sources of pollutants to waters of the state."

Delete that portion of the sentence that reads: "unless the discharges from fire activities are identified as significant sources of pollutants to waters of the state." There is concern that if this is not removed from the Permit, and the water from a fire fighting activity contaminates the waters of the state, the door has been opened for third-party lawsuits.

In the protection of life and property, it is in most instances, impracticable to refrain from discharge of water from fire fighting emergency operations because of a pollutant potential. [City of Yakima Fire Chief in Memorandum dated March 6, 2006.]

The U. S. Environmental Protection Agency Model Ordinances to Protect Local Resources, Model Ordinances Language, at Section VII , Discharge Prohibitions, includes fire fighting activities as an exemption to the conduct of illegal discharge.

40 CFR 122.26(b)(2) exempts discharges resulting from fire fighting activities.

2. Permit S4.C, page 6, lines 20 and 21 reads: "The Permittee shall reduce the discharge of pollutants to the maximum extent practicable [MEP]." The Fact Sheet, page 24, last paragraph, reads: "Neither Congress nor EPA has defined MEP and have instead left the determination of what constitutes MEP up to the individual permitting authorities."

S4.C of the Permit should clearly state that if the terms and conditions of the Permit are met, then MEP has been fulfilled.

3. Permit S5.B.3.b.ii, page 10, beginning at line 35 reads: "Non-stormwater discharges . . . from emergency fire fighting activities are allowed in the MS4 in accordance with S2 *Authorized Discharges*."

See comments for S2.C above which also apply to S5.B.3.b.ii.

4. Permit S5.B.3.b.iv, page 11, lines 13-21 as relates to fire hydrant system flushing.

Delete "fire hydrant system flushing."

Fire hydrant system flushing and flow testing must be performed at least once a year to maintain the fire rating issued by the Fire Ratings Bureau. It is vital

to test the flow from a hydrant to determine whether the flow meets Fire Code and ensures adequate flow is available for fire protection. According to discussions with a municipal Water/Irrigation Division Manager, it would defeat the purpose of the flow test if the flow was restricted during the test. Devices applied to fire hydrants to control sediments, restricts flow.

The U.S. Environmental Protection Agency, Model Ordinances to Protect Local Resources, Model Ordinances Language, at Section VII, Discharge Prohibitions, includes water line flushing as an exemption to the conduct of illegal discharge.

Roy D. Dodson, P.E., *Storm Water Pollution Control: Municipal, Industrial, and Construction NPDES Compliance*, McGraw Hill, includes discharges from fire-fighting activities and fire hydrant flushing as EPA allowable non-stormwater discharges.

5. Permit S5.B.4.b.i, page 15, starting at line 35, reads: "Prior to construction, Permittees shall review Construction SWPPPs. . . . to ensure that the plans are complete pursuant to the requirements of Appendix 1, Core Element #2."

This provision is contrary to the Construction Stormwater General Permit [effective December 16, 2006] wherein the SWPPP need not be prepared and implemented until the time of initial soil disturbance or construction activity. It is also contrary to the Fact Sheet, page 14, under Construction Stormwater General Permit, which reads: "Construction site operators that are covered under and operating in compliance with the construction stormwater general permit will be in compliance with the requirements of this permit."

Later, in the Fact Sheet at page 33, first paragraph, Ecology states its intent to make the requirements for developers the same for both the MS4 Permit and the Construction Stormwater General Permit *except for local review of SWPPPs*. Again, this is contrary to the Construction Stormwater General Permit.

The MS4 Stormwater General Permit should not have language that is contrary to the Construction General Permit. Further, early review of the SWPPP and Site Plans will cause additional delay for construction projects. It also undermines the flexible nature and purpose of the general permit process.

6. The Formal Public Comment Draft Phase II Permit for Eastern Washington, at several places, has sentences that end with phrases such as "*to the extent allowable under local and state law*," or "*to ensure compliance to the extent allowable under state law*," or "*to the extent allowable under federal and state law*." Examples of use of these phrases are found at:

S5.B.5, page 17, lines 19-22;

S5.B.5.a, page 17, lines 31-33;

S5.B.5.a.i, page 18, lines 4-6; and,

S5.4, page 14, line 4.

These phrases are vague and will require extensive legal research to guarantee compliance. In order not to create unnecessary burdens, the parameters should be provided, or the phrases deleted from the Permit.

7. Erosivity Waiver.

Appendix 1, Core Element #2, page 3, starting at line 31, reads in part: "Local jurisdictions may choose to allow site operators to apply an 'Erosivity Waiver' to projects. . . such projects would be waived from the requirement that the *jurisdiction review* site plans for construction phase stormwater pollution prevention."

Appendix 1, Core Element #2, pages 8 and 9 reads in part: "The local jurisdiction may allow construction site operators to qualify for a waiver from the requirement to *submit* a SWPPP for *local jurisdiction review*. . ."

These two provisions, as written in the MS4 Permit, clearly indicate that preparation of a Stormwater Site Plan and a Stormwater Pollution Prevention Plan must still be prepared, even with compliance of the Erosivity Waiver Certification, which is to obtain "an exclusion from NPDES stormwater permitting." This undermines the intent and purpose of the Erosivity Waiver.

The words *SUBMIT* and *REVIEW*, as used in the Permit, imply that the Site Plan and Stormwater Pollution Prevention Plan must be prepared, but it is not necessary to present the SP and SWPPP to the local jurisdiction for review.

The requirements and purpose for the Erosivity Waiver should be the same as in the Construction Stormwater General Permit.

8. Appendix 3, Annual Report.

There are definite concerns that reporting any non-compliance with the schedules established in the Permit will invite third-party lawsuits.

9. FACT SHEET S5.A.4.a.ii, page 28. This page requires the tracking of costs for specified activities in order that Ecology may obtain data to evaluate the MEP standard for future permits. The majority of activities listed are currently performed by local jurisdictions as normal daily work functions.

However, a requirement by Ecology to require local jurisdictions to track these costs for stormwater MEP evaluation purposes, imposes another function and cost burden on local jurisdictions. These additional costs will be added to the Stormwater Utility Fee.

It is certainly not apparent what will be gained by tracking these costs to evaluate an MEP standard for future permits.

10. S5.B.5, page 17, lines 19-22 reads: "For new development and redevelopment projects that are vested before the effective date of this permit, Permittees must require post-construction stormwater controls to the extent allowable under local and state law."

The phrase "to the extent allowable under local and state law" is vague and will require extensive legal research to determine compliance.

Laws regarding vesting prohibit state and local governments from applying new rules adopted after a completed application is filed. CWHBA submits that the sentence in the first paragraph of item 10 above, be deleted and should instead

state: "Permittees cannot require post-construction stormwater controls on projects that are vested before the effective date of this permit."

11. S5.B.4.a.v, page 15, starting at line 20, requires escalating enforcement sanctions for construction sites that fail to meet the timeline restrictions of the Erosivity Waiver.

Construction is often unavoidably delayed by unforeseen circumstances.

The Construction Stormwater General Permit is fair in that it provides that if construction activity is going to extend beyond the certified waiver period for any reason, the operator has two options to correct the situation.

The Construction Stormwater General Permit at S2.C.6, pages 8 and 9, provides opportunity for the operator to either:

a. Recalculate the rainfall erosivity R factor, and if the project can be completed within the revised time line, to submit an amended waiver certification form; or,

b. Submit a complete permit application to Ecology in accordance with the provisions of the Construction Permit before the end of the certified waiver period.

The requirements in the MS4 Permit should be the same as in the Stormwater Construction General Permit.

12. Appendix 1, Core Element #2, page 5, Stabilize Soils, starting at line 13.

The MS4 Permit uses different wording than the Construction Permit. The Construction Permit uses area designation, rather than mean annual precipitation. The Permits should use consistent terminology.

The time restraints at sites with mean annual precipitation less than 12 inches [arid region] are unreasonable. Rather than this requirement being a mandatory imposition, it should be an optional BMP.

The developer has responsibility to determine and apply the most efficient BMPs. Covering exposed soils is expensive and may not be needed or the most efficient BMP at a given time.

**MS4 May 19, 2006
05/03/06**